Supreme Court, U.S.
FILED
JUN 13 2000
OFFICE OF THE CLERK

(3)

No. 00-1710

In The

Supreme Court of the United States

ZACHARY WITMAN,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition For A Writ Of Certiorari To The Superior Court Of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

H. STANLEY REBERT
District Attorney
Counsel of Record
TIMOTHY J. BARKER
Senior Deputy Prosecutor
YORK COUNTY DISTRICT
ATTORNEY'S OFFICE
28 East Market Street
York, Pennsylvania 17401
(717) 771-9709

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pp

COUNTER-STATEMENT OF QUESTION PRESENTED

Does the petitioner raise an issue meriting review by this Honorable Court when the petitioner's arguments rest upon misstatements of the Pennsylvania Superior Court's opinion and require the United States Supreme Court to conduct a factual evaluation that is inappropriate for the Supreme Court's consideration?

TABLE OF CONTENTS

Page

Counter-Statement of Questions Presented i

Table of Authorities iii

Statement of Jurisdiction..... 1

Counter-Statement of the Case..... 1

Procedural History 1

Statement of Facts..... 2

Reason for Denying the Writ of Certiorari 4

This Honorable Court should not grant a writ of certiorari to review the issues raised by the petitioner, as they rest upon misstatements of the Pennsylvania Superior Court's opinion and require the United States Supreme Court to conduct a factual evaluation that is inappropriate for the Supreme Court's consideration..... 4

Conclusion 9

TABLE OF AUTHORITIES

Page

CASES:

Flippo v. West Virginia, 528 U.S. 11, 145 L. Ed. 2d 16 (1999) 5, 8

General Talking Pictures Corporation v. Western Electric, 304 U.S. 175, 82 L. Ed. 1273 (1938) 8

Mincey v. Arizona, 437 U.S. 385, 57 L. Ed. 2d 290 (1978) 5

Commonwealth of Pennsylvania v. Witman, 750 A.2d 327, 2000 Pa. Super. 92 (2000) 1, 2, 3, 6, 7

STATUTES:

28 U.S.C. 1257(a) (1988) 1

STATEMENT OF JURISDICTION

The Pennsylvania Supreme Court denied petition for Allowance of Appeal on December 20, 2000. Such an order constitutes a final order and invokes the United States Supreme Court's Jurisdiction. 28 U.S.C. 1257(a).

COUNTER-STATEMENT OF THE CASE

A. Procedural History

Petitioner, Zachary Witman, was arrested on October 2, 1998 for the murder of his 13-year-old brother. Petitioner moved to suppress evidence that had been seized during a search of his home.

Hearings were held on February 8 and March 31, 1999, before President Judge John C. Uhler in the Court of Common Pleas, York County. Judge Uhler granted the Motion to Suppress the evidence.

The Commonwealth of Pennsylvania appealed Judge Uhler's suppression to the Superior Court of Pennsylvania. On March 28, 2000, the Superior Court reversed Judge Uhler's order as to 16 of the 22 items suppressed. The Superior Court concluded that the appellant's request for emergency aid, coupled with the parents' requests, constituted a consensual search of the home. *Commonwealth of Pennsylvania v. Witman*, 750 A.2d 327, 339 (2000).

Petitioner filed a timely Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. That petition was denied on December 20, 2000.

B. Statement of Facts

On October 2, 1998, at approxiatmely 3:17 p.m., a call was received by 911 from the Witman residence. *Commonwealth of Pennsylvania v. Witman*, 750 A.2d 327, 330. The caller identified himself as 15-year-old Zachary Witman, reporting that his brother, 13-year-old Gregory Witman, was injured. Zachary Witman asked for medical personnel and police to respond to his home; both arrived at the scene at 3:25 p.m. *Id.* at 330. Arriving at the scene, the police and emergency personnel found Zachary Witman in the garage of the home. *Id.* at 330. They observed blood on Zachary's clothing and hands and located the body of Gregory Witman. *Id.* at 330.

Zachary informed the police that he had been upstairs sleeping when he heard the front door open and close closely followed by a struggle. *Id.* at 330. Zachary stated that he then proceeded downstairs where he discovered his brother lying on the laundry room floor. *Id.* at 330. Based on the information provided by Zachary, the police then entered the home to conduct a "protective sweep" to determine if anyone else was in the home. *Id.* at 331. No other individual was found in the home; however, significant blood splatters were observed in several locations throughout the residence. *Id.* at 331.

Due to his distraught emotional state, Zachary was later transported to the hospital. *Commonwealth of Pennsylvania v. Witman,* 750 A.2d 327, 331 (2000).

Amelia Sue Witman, mother of Zachary and Gregory, arrived at the scene between 4:00 p.m. and 4:45 p.m. *Id.* at 332. Officer Childs explained to Ms. Witman " . . . what we were going to do as far as what we needed to do as far as processing the crime scene to obtain clues." *Id.* at 332. He explained to her that personnel specialized in processing crime scenes had been called in. *Id.* at 332. Officer Childs testified that Mrs. Witman demanded that the police find her son's killer, telling him, "You better do your job." *Id.* at 332.

Police began a full-scale search of the residence and its curtilage at 5:30 p.m. *Id.* at 332. This search led to the seizure of the 22 items brought before the Superior Court.

Ronald Witman, the boys' father, arrived at the hospital around 8:00 p.m. *Id.* at 333. When Mr. Witman was informed of the investigation the police were conducting, the father stated, "Whatever it takes, do." *Id.* at 333.

Granting the Motion to Suppress, Judge Uhler denied 22 pieces of the evidence discovered. However, this order was reversed in part (16 items were admitted) by the Superior Court because the evidence was discovered during a protective sweep pursuant to the "plain view" doctrine and the consensual search. *Id.* at 339. The Superior Court upheld the suppression of the remaining six (6) items because they were seized pursuant to a search order that did not include the areas searched. *Id.* at 339.

REASONS FOR OPPOSING THE WRIT OF CERTIORARI

This Honorable Court should not grant a writ of certiorari to review the issues raised by the petitioner, as they rest upon misstatements of the Pennsylvania Superior Court's opinion and require the United States Supreme Court to conduct a factual evaluation that is inappropriate for the Supreme Court's consideration.

The petitioner's request for Writ of Certiorari should not be granted because the issues raised by petitioner rest upon incorrect interpretations of the Pennsylvania Superior Court's ruling, and require the United States Supreme Court to conduct a factual evaluation, which is inappropriate for the Supreme Court's consideration. Since the petitioner has failed to provide a genuine legal argument for the United States Supreme Court to review, the petition for Writ of Certiorari should be denied.

First, the petitioner wrongly accuses the Pennsylvania Superior Court of reversing the suppression court's decision on the basis of the "crime scene exemption." In actuality, the Superior Court did not use this unconstitutional exemption, but clearly established that the search of the petitioner's residence occurred pursuant to a lawful consent. Second, the petitioner incorrectly implies that the Superior Court's finding of consent rose solely from the summons for emergency personnel by the petitioner. The Superior Court, however, limited the consent established by the petitioner's request for emergency assistance to providing the police with the right to enter the premises to perform a protective sweep. The Superior Court found that the mother and the father were the

individuals who provided consent to search the home for the balance of the evidence. Finally, the petitioner attempts to argue a Due Process violation based upon the theory that the mother's extreme emotional state at the scene of the crime rendered her unable to grant voluntary consent. This is a purely factual decision which is the responsibility of the trier of fact and inappropriate for the Supreme Court's consideration.

Since the petitioner has failed to provide a genuine legal argument for the United States Supreme Court to review, the petition for Writ of Certiorari should be denied. Accordingly, the holding of the Pennsylvania Superior Court should be upheld.

In his first two questions presented the petitioner misinterprets the Superior Court's decision. First, the petitioner states that the Superior Court reversed the suppressing court's decision on the basis of a "crime scene exemption." Second, the petitioner implies that the Superior Court concluded that any consent to search the petitioner's residence rests entirely upon the petitioner's summons for emergency personnel. Neither of these interpretations of the Superior Court's decision is correct.

The Superior Court did not apply a "crime scene exemption" to its conclusion in regards to the case at bar. The "crime scene exemption" suggests that an exception to a warrantless search may exist "simply because a homicide occurred [at the scene]." *Flippo v. West Virginia*, 528 U.S. 11, 14, 145 L. Ed. 2d 16, 20 (1999). However, in *Mincey v. Arizona*, 437 U.S. 385, 395, 57 L. Ed. 2d 290, 302 (1978), the United States Supreme Court rejected the use of the "murder (crime) scene exemption" as a means to

escape the warrant requirement. In its opinion, the Superior Court clearly reiterates the Supreme Court's holding in *Mincey* stating that the "crime scene exemption" is invalid and therefore inappropriate to apply to the case at bar. *Commonwealth of Pennsylvania v. Witman*, 750 A.2d 327, 337 (2000).

The Superior Court did conclude that its decision to allow the evidence was based on the presence of consent. The court found that both the petitioner and his parents granted consent to the entry and search of the home. *Id.* at 339.

In the second question presented, the petitioner attempts to argue that the Superior Court found that the petitioner's request for medical assistance established the consent that enabled the police to search his entire residence. Again, this is an incorrect interpretation of the Superior Court's decision. The Superior Court actually found that the consent of his mother and father, not just the petitioner, allowed the extended search of the home. *Commonwealth of Pennsylvania v. Witman*, 750 A.2d 327, 339 (2000). The issue raised by petitioner does not adequately represent the Superior Court's opinion in its entirety.

Specifically, the Superior Court found that the petitioner's initial request for emergency assistance, and his indication that the attacker may still be on the premises, permitted emergency personnel to enter the home to provide aid to the injured brother and for police to perform a "protective sweep." *Id.* at 335. The court found that any evidence that was obvious during these searches

was considered admissible under the "plain view" doctrine. *Id.* at 336. The Superior Court then concluded that consent to search the home for evidence not in plain view was established by: 1) the mother when she stated to the officer, "you better do your job and find out who did this." *Id.* at 338; and 2) the father when he later stated to the police, "whatever it takes, do." *Id.* at 339.

The Superior Court reasoned that the initial valid and permissible warrantless search conducted pursuant to the petitioner's summons for emergency personnel continued without interruption into the consensual search. *Commonwealth of Pennsylvania v. Witman*, 750 A.2d 327, 339 (2000). As a result, all the evidence collected within plain view and under the consensual search is admissible.

The Superior Court clearly established that the evidence was obtained as the result of a consensual search granted by both the petitioner and his parents. As a result, the petitioner is incorrect in stating that the Superior Court concluded that consent was granted only by the appellant. Because the petitioner fails to provide a legal argument that stems from an accurate analysis of Superior Court's decision, neither question presented merits a grant for a Writ of Certiorari.

In his final issue, the petitioner also requests that the United States Supreme Court reevaluate the Pennsylvania Superior Court's factual conclusion regarding whether consent was granted. The petitioner attempts to argue a Due Process violation based upon the theory that the mother's extreme emotional state at the scene of the crime rendered her unable to grant voluntary consent.

This, however, is a purely factual decision that is the responsibility of the trier of fact and inappropriate for the Supreme Court's consideration.

Issues that require a factual decision are inappropriate for the Supreme Court; therefore, the appellant should not have raised the question as a basis for a writ for certiorari. Generally, the Supreme Court will not disturb a factual decision by a lower court that is supported by legal authority and appropriate facts. *General Talking Pictures Corporation v. Western Electric*, 304 U.S. 175, 178, 82 L. Ed. 1273, 1275 (1938). Moreover, the Supreme Court has specifically stated that the issue of consent is a factual question unsuitable for its consideration in the first instance. *Flippo v. West Virginia*, 528 U.S. 11, 14, 145 L. Ed. 2d 16, 20 (1999). The Superior Court's factual conclusion that consent was granted by the mother is not appropriate for review by the United States Supreme Court.

The petitioner has failed to provide a genuine legal argument for the United States Supreme Court to review; therefore, the petition for writ of certiorari should be denied. The Pennsylvania Superior Court's supported conclusion that the evidence was collected under a consensual search should be upheld.

CONCLUSION

For all the foregoing reasons, the Respondent respectfully requests that this Honorable Court deny a Writ of Certiorari to review the decision below.

Respectfully submitted,

H. STANLEY REBERT
District Attorney
Counsel of Record
TIMOTHY J. BARKER
Senior Deputy Prosecutor
YORK COUNTY DISTRICT
ATTORNEY'S OFFICE
28 East Market Street
York, Pennsylvania 17401
(717) 771-9709